FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CERTIFIED MAIL
VIA FIRST CLASS MAIL

APR 16 2007

The Honorable Chris Lauzen
Illinois Senate
116 South Elmwood Drive
Aurora, IL 60506

RE: MUR 5722
Friends for Lauzen

Dear Mr. Lauzen:

On March 27, 2006, the Federal Election Commission notified you of a complaint alleging certain violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). On February 21, 2007, the Commission found no reason to believe that you violated 2 U.S.C. §§ 433 and 434, and, in an exercise of prosecutorial discretion, dismissed the allegation that you violated 11 C.F.R. § 100.72(a). *See Heckler v. Chaney*, 470 U.S. 821 (1985). Accordingly, the Commission closed its file in this matter.

The Commission reminds you that only funds that are permissible under the Act may be used for testing the waters activities. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). Since candidates may not use funds from their nonfederal campaigns to fund their federal campaigns pursuant to 11 C.F.R. § 110.3(d), individuals testing the waters may not use money from their non-federal campaigns to fund federal testing the waters activity. You should take steps to ensure that this activity does not occur in the future.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A copy of the Factual and Legal Analysis explaining the Commission's decision is enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at 202-694-1650.

Sincerely,

Thomasenia P. Duncan
Acting General Counsel

BY: Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Friends for Lauzen and Lee Holmes, in his official capacity, as Treasurer; Chris Lauzen

MUR: 5722

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Lisa Pierce, alleging a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"), by Friends for Lauzen and Lee Holmes, in his official capacity, as Treasurer (hereinafter "the State committee") and Chris Lauzen.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

The complaint in this matter alleges that Illinois State Senator Chris Lauzen and Friends for Lauzen, a State political committee formed for the purpose of re-electing Mr. Lauzen to the Illinois State Senate, may have violated the Act by using funds from the state campaign account to pay for an exploratory telephone poll for a possible run for Congress. The complaint cites a news article about a telephone poll conducted in or around November 2005 that "seemed to promote" Mr. Lauzen for Congress. According to the complaint, a number of individuals confirmed that they had been called to participate in such a telephone poll. The complaint questions who paid for the poll, and, referring to Mr. Lauzen's State committee's disclosure reports, specifically questions the nature of a $12,750 expenditure for "campaign consulting" made by Friends for Lauzen on December 7, 2005 to Sherman Consulting, a firm that provides polling services, among other services.

In response to the complaint, the State committee acknowledges that from November 8-10, 2005, it conducted a poll of Republican voters in the Illinois 14th Congressional District. The State committee further acknowledges that one purpose of the poll was "to gauge voter preferences in a hypothetical congressional election that may or may not occur at some point in the distant future." According to the State committee, among other topics covered in the poll, voters were asked their candidate preference if Representative Dennis Hastert retired from Congress and the 14th District were an "open seat" for the 2008 election cycle.[1]

The State committee does not dispute that funds from Mr. Lauzen's State campaign account were used to conduct the poll. Rather, it argues that the poll at issue was not "testing the waters" activity, and, therefore, was not subject to 11 C.F.R. § 100.131(a), which provides that only funds permissible under the Act may be used to pay for such activity. The State committee asserts that "simply conducting a poll" does not compel the conclusion that Mr. Lauzen was "testing the waters" for federal office, and that the determination of whether an individual is "testing the waters" should be guided by the facts, which it claims show that Mr. Lauzen was not "testing the waters" for a federal election.

In support, the State committee asserts that before the poll at issue was conducted, Mr. Lauzen had publicly declared his intention to seek re-election to the State Senate, and had taken steps to get on the ballot for the 2006 primary and general election for that purpose; therefore, because he was a candidate for State office in 2006, the State committee asserts that Mr. Lauzen was "obviously not a candidate" for Representative Hastert's seat in that election cycle. The

[1] The State committee states that other purposes of the poll included: (1) to measure Mr. Lauzen's name identification and popularity among rank and file party members in the 14th District prior to a possible run for State Central Committeeman in that district, and (2) to assist in the planning of fundraising and other political strategy apparently in connection with his re-election to the Illinois State Senate. The State committee did not include a copy of the telephone poll in its response

State committee also asserts that the Commission's regulations and precedent "generally hold that activity must be in close proximity to an election for the activity to be deemed for the purpose of 'testing the waters' or campaigning for federal office." Finally, the State committee argues that even if Mr. Lauzen had engaged in testing the waters, it had received amounts of "hard money" that were more than sufficient to cover the $12,750 cost of the poll.

The complaint also alleges that on January 17, 2006, the complainant received an electronic email message generated from a website maintained by the State committee. The email message stated that it was from "Lauzen for Congress." *See* Complaint, Exhibit C. The email contains a commentary entitled "Capital Spending Done Properly and State of the State Speech Preview" written by State Senator Lauzen. *Id.* In the commentary, Mr. Lauzen shares his views regarding a capital spending program that he expected Illinois Governor Rod Blagojevich to address in an upcoming State of the State speech to the Illinois General Assembly. *Id.* Citing this email message, the complaint questions whether "Lauzen for Congress" should have registered and reported as a political committee pursuant to 2 U.S.C. §§ 433 and 434.

The State committee acknowledges that the email was sent, but asserts that the inclusion of the display name "Lauzen for Congress" was inadvertent. The State committee explains that the mass email cited in the complaint was generated by Integrated Web Strategy ("IWS"), a firm it engaged to provide web hosting and other electronic communications services. Attached to the response is a letter signed by Max Fose, the owner IWS, stating that the inclusion in the email of the display name "Lauzen for Congress" was "a clerical error on behalf of IWS" and that "at no time has [the] Chris Lauzen for State Senate Campaign Committee stated that Senator Lauzen is running for Congress." Further, the State committee points out that the email at issue was sent at

1:58 p.m. on January 17, 2006, and that it sent out a second email, 90 minutes after the original email, that contained an explanation that the display name in the first transmission contained an error, and a statement that Mr. Lauzen was a candidate for re-election to the State Senate. Finally, the State committee asserts that on the day the email was sent, Mr. Lauzen was an announced candidate for re-election to the Illinois State Senate, and that the email was sent in connection with Mr. Lauzen's state campaign activity. For all of these reasons, the State committee argues that "Lauzen for Congress" was not required to register and report as a political committee under the Act.[2]

B. LEGAL ANALYSIS

1. Alleged Use of Prohibited Funds for Testing the Waters Activity

At issue is whether the telephone poll constituted "testing the waters" activity and, therefore, could only be paid for with funds subject to the limitations and prohibitions of the Act. Under 2 U.S.C. § 431(2)(A), an individual is deemed to be a "candidate" for purposes of the Act if he or she receives contributions or makes expenditures in excess of $5,000. *Explanation and Justification for Regulations on Payments Received for Testing the Waters Activities*, Fed. Reg. 50 F.R. 9992 (March 13, 1985). The Act thus establishes automatic dollar thresholds for attaining candidate status, which trigger its registration and reporting requirements. *Id.* Through its regulations, the Commission has established limited exceptions to these automatic thresholds, which permit an individual to test the feasibility of a campaign for Federal office without becoming a candidate under the Act. *Id.* Commonly referred to as the "testing the waters"

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[2] In a supplemental response to the complaint, the State committee argues that the complainant did not reside at the address listed in the complaint and, therefore, the complainant failed to adhere to 11 C.F.R § 111.4, which requires a complainant to provide his or her address The State committee argues that, for this reason, the Commission should take no action on this matter pursuant to 11 C F.R. § 111 5(b) However, a search of public records revealed that the complainant, in fact, resided at the address noted in the complaint.

exceptions, 11 C.F.R. §§ 100.72 and 100.131 exclude funds received and payments made to determine whether an individual should become a candidate from the definitions of "contribution" and "expenditure." Under the regulations, "testing the waters" activities include, but are not limited to, payments for polling, telephone calls, and travel. The regulations further state that only funds permissible under the Act may be used for such activities. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a).

The State committee's claim that the poll at issue was not "testing the waters" activity is unpersuasive. By its own admission, the poll at issue was conducted, at least in part, "to gauge voter preferences in a hypothetical congressional election," and asked voters their candidate preference if Dennis Hastert retired from Congress and the 14th Congressional District were an "open seat" for the 2008 election cycle. Thus, the facts of this matter place the poll within the "testing the waters" provisions. Contrary to the State committee's argument, the fact that Mr. Lauzen may have also been seeking a run for re-election as a State senator in 2006 does not preclude that he was also exploring a possible run for Congress in 2008.

The State committee appears to cite MUR 4759 for the proposition that activity must be in close proximity to an election for the activity to be deemed for the purpose of "testing the waters." However, MUR 4759 does not support this proposition. At issue in MUR 4759 was the date on which an individual had crossed the line from testing the waters and had become a candidate within the meaning of 2 U.S.C. § 431(2), thus triggering the requirement that, within 15 days from that time, the individual designate a principal campaign committee ("PCC"), and the requirement that, within 10 days following the 15-day period, the PCC file a Statement of Organization. The Commission's decision in MUR 4759 did not address whether activity must be in close proximity to an election to be deemed for the purpose of "testing the waters." *See*

Statement of Reasons in MUR 4759 (Friends of Phil Maloof) of Commissioners Thomas, Wold, Elliott, Mason, McDonald and Sandstrom dated May 10, 1999.

Contrary to the State committee's argument, activity does not have to be close in proximity to an election for it to be deemed for the purpose of "testing the waters." The testing the waters provisions, 11 C.F.R. §§ 100.72 and 100.131, do not contain a timing prerequisite, and often potential candidates will engage in testing the waters activity well in advance of an election. For example, in Advisory Opinion 1981-32, the requester proposed to undertake a variety of activities to determine whether to run for federal office in an election that would not take place for over two years. The requestor asked whether planned activities related to his efforts to decide in 1981 whether he should become a presidential candidate for the 1984 election would be considered by the Commission as exempt "testing the waters" activities under the regulations. The Commission concluded they would, as long as the requestor continued to deliberate his decision to become a presidential candidate in 1984, as distinguished from conduct signifying that a private decision to become a candidate had been made. Similarly, here, although the poll at issue was conducted to determine the feasibility of a potential run for Congress in an election that was over two years away, the activity would still fall within the "testing the waters" regulations.

In addition, the fact that Mr. Lauzen has not yet become a candidate, and may never become a candidate, does not preclude the applicability of the "testing the waters" regulations. The regulations specifically apply to situations in which an individual is considering whether he or she should become a candidate, but has not decided, and may never decide, to do so. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). In MUR 2133, the Republican National Committee had made an in-kind testing the waters disbursement for a poll for then Vice President George H. W.

Bush in an amount in excess of the limit of 2 U.S.C. § 441a(a)(2)(A). The Vice President had not, at that time, become a candidate for President of the United States. The Commission concluded that the poll would be a contribution if the Vice President were a candidate and, even without such candidacy, was still subject to the limit of 2 U.S.C. § 441a(a)(2)(A) pursuant to 11 C.F.R. § 100.8(b)(1).[3] Therefore, the Commission found reason to believe the Republican National Committee violated 11 C.F.R. § 100.8(b)(1) by making an excessive in-kind disbursement to Vice President Bush in the form of poll results, and that Vice President Bush violated 11 C.F.R. § 100.7(b)(1) by accepting the excessive in-kind contribution.[4] *See also* Advisory Opinion 1998-18 (Washington State Democratic Committee) (the costs of a telephone poll conducted for the purpose of "testing the waters" for a potential federal candidate, who never became a candidate, must nevertheless be paid for with funds from the State party's federal account).

Thus, the poll at issue was subject to Section 100.131(a), which prohibits the use of funds in excess of the contribution limits or from prohibited sources under the Act for "testing the waters" activities. The State committee does not dispute that funds from Mr. Lauzen's State campaign account were used to conduct the poll, and acknowledges that it had received campaign contributions from corporations.[5] However, the State committee argues that it had

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[3] The "testing the waters" provisions located at 11 C F R §§ 100 7(b)(1) and 100 8(b)(1) were redesignated 11 C.F.R §§ 100.72(a) and 100 131(a) in a restructuring of the Commission's regulations that followed the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155

[4] After Vice President Bush became a candidate for President, the Commission pursued the Vice President's authorized campaign committee, which was the Vice President's "successor in interest" in the proceedings Thus, the Commission found probable cause to believe George Bush for President, Inc. violated 11 C F.R § 100.7(b)(1); the Commission then found no probable cause to believe the Vice President violated 11 C.F R § 100 7(b)(1) and decided to take no further action with respect to the violation of 11 C F R § 100 8(b)(1) by the RNC

[5] Illinois law allows state campaign committees to receive unlimited campaign contributions from individuals, as well as corporations and labor unions

received amounts raised within the limits and source restrictions of the Act that were "more than sufficient" to cover the $12,750 cost of the poll it paid for on December 7, 2005.

The Commission agrees that the State committee had sufficient permissible funds to cover the $12,750 it paid for the poll.[6] However, Section 110.3(d) of the Commission's regulations prohibits all transfers from the nonfederal to a federal campaign of the same individual regardless of whether the funds used are permissible under the Act. While Section 110.3(d) does not explicitly include within this prohibition transfers made during the testing the waters phase of a federal campaign, Sections 100.72(a) and 100.131 make clear that only permissible funds may be used for testing the waters activities. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). Thus, since candidates may not use money from their nonfederal campaigns to fund their federal campaigns, individuals testing the waters may not use money from their nonfederal campaigns to fund federal testing the waters activity. Therefore, the State committee violated 11 C.F.R. § 100.131(a) by making an in-kind disbursement, in the form of a poll for testing the waters purposes, and Chris Lauzen violated 11 C.F.R. § 100.72(a) by accepting the in-kind disbursement.

The amount of the violation is equal to the Federal share of the $12,750 the State committee paid for the poll. The State committee has identified the following purposes for the poll: (1) to gauge voter preferences in a hypothetical congressional election; (2) to measure Mr.

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[6] In its 2005 Semi-Annual Report filed with the Illinois State Board of Elections, which covers the period July 1, 2005 through December 31, 2005, the committee reported $29,375 32 in cash on hand at the beginning of the reporting period During the reporting period, the committee received $46,885 in permissible itemized contributions from individuals and $14,931 in permissible non-itemized contributions from individuals (contributions of less than an aggregate amount of $150) for a total of $61,816 in permissible funds The State committee had received $61,266 of these permissible funds prior to making the $12,750 disbursement for the poll on December 7, 2005, and had expended only $56,730 39 by that time Based on a "First In, First Out" accounting method, the $29,375.32 available at the beginning of the reporting period, plus $27,355 07 of the permissible funds received, would have been used for the $56,730 39 in disbursements the State committee made prior to December 7, 2005 That would leave $33,910.93 in permissible funds available on December 7, 2005 – more than enough to cover the State committee's $12,750 disbursement for the poll.

Lauzen's name identification and popularity among rank and file party members in the 14th District prior to a possible run for State Central Committeeman in that district; and (3) to assist in the planning of fundraising and other political strategy apparently in connection with his re-election to the Illinois State Senate. The Commission has no information indicating otherwise and, accordingly, concludes that one portion of the cost of the poll is attributable to testing the waters for a potential run for federal office, a second portion is attributable to testing the waters for a potential run for State Central Committeeman, and a third portion is attributable to Mr. Lauzen's race for Illinois State Senator. A possible method of attribution would be to divide the cost of the poll, $12,750, equally between the three purposes for the poll. *See* 11 C.F.R. §§ 106.4(e)(2), (4) (the amount of a contribution attributable to multiple recipients of poll results shall be computed by dividing the overall cost of the poll equally, or by any other method which reasonably reflects the benefit derived). Thus, using this method, the amount of the in-kind disbursement that the State committee made on behalf of Mr. Lauzen's federal testing the waters effort is $4,250.

Nevertheless, considering together the relatively small amount at issue, and the facts that Mr. Lauzen has not and may never become a candidate for federal office, and available information suggests that he has done nothing else to test the waters or further a potential candidacy for federal office, the Commission dismisses this allegation in an exercise of prosecutorial discretion, and admonishes the Respondents.

2. **Alleged Political Committee Status**

Alleging the receipt of an email from "Lauzen for Congress," the complaint asks the Commission to investigate whether "Lauzen for Congress" should have registered and reported as a political committee pursuant to 2 U.S.C. §§ 433 and 434. Section 433 of the Act requires

each authorized campaign committee of a candidate to file a statement of organization no later than 10 days after its designation, and requires all other political committees to file a statement of organization within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4) (political committee is a group of persons which receives contributions or makes expenditures aggregating in excess of $1,000 during a calendar year). Section 434 requires a political committee to file periodic financial disclosure reports with the Commission.

The Commission concludes that the facts in this matter do not provide a sufficient basis for investigating whether "Lauzen for Congress" should have been registered with and filed disclosure reports to the Commission as a political committee. There is no information that suggests that Mr. Lauzen had crossed the line from testing the waters and had become a federal candidate pursuant to 2 U.S.C. § 431(2), or that "Lauzen for Congress" received any contributions or made any expenditures that could trigger political committee status pursuant to 2 U.S.C. § 431(4). Moreover, the email at issue related exclusively to State matters, and the State committee asserts that any reference to Mr. Lauzen's alleged congressional committee was an inadvertent error made by a vendor, and was corrected with a subsequent email within 90 minutes. Based on the foregoing, there is no reason to believe Chris Lauzen violated 2 U.S.C. § 433 by failing to register "Lauzen for Congress" as a political committee, or 2 U.S.C. § 434 by failing to file disclosure reports with the Commission concerning "Lauzen for Congress."